FILE COPY

OCT 12 193
CHARLES ELMORE CR
CLE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 453

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

HANNAH R. TEMPLE, ADMINISTRATRIX OF THE ESTATE OF JOSEPH R. TEMPLE, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

THOMAS W. DAVIS,
Wilmington, N. C.;
DOUGLAS McKAY,
Columbia, S. C.;
V. E. PHELPS,
Wilmington, N. C.,
Counsel for Petitioner.

INDEX TO PETITION FOR WRIT OF CERTIORARI.

Subject Index.

	Page
Petition for writ of certiorari:	
I. Statement of matters involved and reasons relied on by petitioner for issuance of writ	2
II. Grounds relied on for issuance of writ of certiorari	11
Prayer for writ	12

Authorities Cited.

Atlantic Coast Line R. Co. vs. Davis, Admr., 279 U. S., 34	11
Norfolk & W. Ry. Co. vs. Gillespie, 224 Fed., 316 (C. C. A., 4th Cir.)	11
Savitz vs. Lehigh & N. E. R. Co., 199 Pa., 218; 48 Atl., 987	11

Statute Cited.

Federal Employers' Liability Act, as amended	2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 453

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

HANNAH R. TEMPLE, ADMINISTRATRIX OF THE ESTATE OF JOSEPH R. TEMPLE, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Atlantic Coast Line Railroad Company, respectfully asks this Court to review on writ of *certiorari* a judgment of the Supreme Court of the State of South Carolina in the case of *Hannah R. Temple, Administratrix of the Estate of Joseph R. Temple, deceased,* versus *Atlantic Coast Line Railroad Company,* rendered on July 31, 1931, as shown by a

true copy of the record therein, herein filed (R., 201). Under the practice prevailing on appeal in South Carolina, no final judgment separate from the opinion of the Supreme Court is rendered, and the opinion is the final judgment. See Clerk's certificate (R., 217).

The matters involved and the reasons relied on by petitioner for the allowance of the writ are:

I.

This action was brought, tried and decided under the Federal Employers' Liability Act, as amended (R., 3, 7, 9, 201), to recover for the alleged negligent death of Joseph R. Temple, an engineer in the employment of the petitioner, who was killed in a wreck of petitioner's passenger train, which occurred at or about 3:10 a. m. on the morning of May 20th, 1921, while the train was being operated over the track of the Charleston & Western Carolina Railway Company, under a trackage agreement. The accident happened at a point in South Carolina about four and one-quarter miles east of Augusta, Georgia, and about one and one-quarter miles from the Savannah River (R., 6, 29) and about a mile and one-half, or one and three-tenths miles west of the station at Beech Island, S. C. (R., 13, 129), which is between Ellenton, S. C., and Augusta, Ga. The train was running from Augusta towards Ellenton, S. C., and Sumter, S. C. The track is practically level from the Savannah River to Beech Island station (R., 131). The only ground of negligence alleged in the complaint was (R., 6) that the section employees of the Charleston & Western Carolina Railway Company had negligently failed to spike

and bolt one of the rails on which the train had to run and keep the same properly spiked and bolted, thereby causing one of the rails to spread and the engine to turn over, killing intestate. *The sole question involved herein* (R., 200) *is whether there is any substantial evidence to sustain a finding that intestate's death was caused as alleged.*

As but two witnesses testified for respondent, only one of whom was at the wreck after the derailment, and as the testimony of this witness substantially agrees with the testimony of one or more of petitioner's witnesses, petitioner feels that it will conduce to clearness in considering the testimony to first state the material evidence offered by respondent and to then state the undisputed part of petitioner's testimony. Respondent's witness Dobson arrived at the wreck about 6:30 a. m. and found one rail torn up and bolts and spikes were lying loose on the cross-ties, and the engine, tender and two coaches were off the track (R., 13, 14); there was a dent about the center of the middle of the rail that was not in line, which might have been made by the train coming from Augusta, but it looked like it would not have been made by one coming from the other direction (R., 15); the bolts and angle bars had been "removed" by somebody from the rail which was loose and out of place (R., 17), and that end of the rail toward Ellenton was pulled in and *spiked* in from the outside, making the track too narrow and wrecking the train (R., 17, 18).

This witness first stated that the spikes removed from this rail were torn out (R., 17), but afterwards testified (R., 19 and 20) that he saw the dent where

the spikes were *pulled out*, and that there was no doubt the spikes were pulled out and it was not a matter of fixing the track and leaving them out; that the spikes from three cross-ties had been pulled, those in the first being pulled on both sides and in some others on the outside; that it looked like the train had been wrecked and there might be some tools around, and that afternoon witness found two tracks of men on a path leading from the wreck to a bluff 50 or 60 feet away, and followed it and found a wrench used for removing the nuts from angle bars and, also, a pull bar used for pulling railroad spikes, which were marked with Southern Railway marks and appeared to be Southern Railway tools (R., 15, 19, 20, 21, 165). While this wrench had some play, when used on the nuts of the Charleston & Western Carolina rail, witness tested it and it would hold enough to remove the nuts (R., 20). The nearest point on the Southern Railway from the wreck is about 5 or 6 miles (R., 21). Witness operated a gravel pit just beyond the place of wreck, and was there every day, except Sunday, and the railroad section forces did not work at the place of the wreck that week, but worked at or near there the week before (R., 16, 18).

As respondent's witness Randall crossed the railroad track in a wagon at Beech Island station (which is 1.3 miles from the wreck), about four or five o'clock on the afternoon before the wreck, he saw some section men working, like fixing a rail, between Beech Island station and the sand pit "way up the road", but witness does not pretend to say just where they were working (R., 24, 26); later this witness stated, in

answer to a leading question, that the men were working "in the vicinity" of the sand pit (R., 27). The sand pit is just beyond the wreck in the direction toward Augusta. See plat, Exhibit 4 (with record).

The following facts are taken from uncontradicted testimony for petitioner; four witnesses, including witness Dobson, who also testified for respondent, testified without contradiction that a person crossing the track at Beech Island station could not see the place of the wreck, *or see nearer than three-tenths of a mile to the point of the wreck,* on account of a five degree curve (R., 126, 129, 34, 58 and 165). This also appears from petitioner's Exhibit 4 (with record). The section foreman having charge of that section, on going to the wreck, found that the dents where the spikes were removed which held the rail which was removed, were freshly made with the heel of a bar (R., 42); the roadmaster in charge of that division of track found, upon going to the wreck that morning, that a rail had been taken out and the spikes holding it pulled out of the ties, and not mashed out, and the bolts taken from the angle bars and the rail shoved out of position; there were dents in the ties where the bar had *pulled* the spikes; the dents were not there before the wreck; the rail fastenings were lying on the ground or cross-ties, with the spikes scattered along at the end of the rail near the Augusta end, where they were taken out (R., 51, 52, 54). A planter, who lived at Beech Island and saw the wreck that morning (R., 55, 57), testified that one end of the rail going from Augusta was set in and the bolts and angle bars removed on the end of the rail toward Ellenton on one side and

the bolts or nuts were on the track near this end and the spikes had been drawn so as to set the rail in; the rail had been unbolted *and set in and was spiked down on the outside* (R., 56, 59, 61) and a wheel had hit the end of the rail toward Augusta (R. 60); he testified the rail had been pulled in out of line from one to three inches and spiked down (R., 61, 63); respondent's witness Dobson also testified that the rail had been pulled in and spiked down (R., 17, 18); the angle bars connecting this and the other rail had been entirely removed so that you could release the rail (R., 65). Petitioner's general roadmaster, who arrived at the wreck about 9:30 a. m., found that the right-hand rail had been removed, bolts and angle bars taken off and lying on the ground and that the spikes had been pulled clean and clear with a crow bar and the rail pushed out 6 to 10 inches from its original position (R., 77, 78, 79, 81, 82); the outside spikes of the removed rail were lying between the ties (R., 83); the flange mark on the ties was to the left of the rail, as it was lying after the wreck, and to the right of the original line of the rail (R., 84, 85). The engineer of maintenance of way of the Charleston & Western Carolina Railway Company, who arrived at the wreck at 5:30 a. m., found conditions with respect to the rail being removed and the bolts and spikes drawn, the same as that testified to by the other witnesses (R., 90, 91), but the bolts and nuts were in a pile at the end of the rail and the spikes were lying between the ties, near the original position of the rail (R., 91). Section foremen in pulling spikes, pull them clear and do not bend them, and are instructed to gather them

up and take them to the section house (R., 93); the spikes were drawn only on the outside of the rail removed (R., 94); with the spikes removed from one-half of the rail, it would not be possible for a train to pass over without getting off (R., 95). The wrecking foreman, who arrived at about 5:30 a. m., found that one rail was ripped up, with the spikes drawn, leaving a clean hole, not mashed out, and the rail shoved forward 7 or 8 feet (R., 109, 110). When spikes are mashed out by a wreck, the spikes will be crooked and the holes larger (R., 110). About eight spikes had been pulled from the inside of the rail just ahead of that removed and the spikes pulled from the rail removed were on the outside and you could see the heel print of crow bar where they had been pulled (R., 124). The engine and front trucks of the first car had passed over the place the rail was taken out of (R., 112, 113). A section master will break the bolts with a hammer in removing an angle bar and carry away the scrap (R., 114). The angle bars were removed from both ends of the removed rail and were lying near the joint where they came out (R., 115); the rail just ahead of the rail which was taken out, appeared to have been struck on the end (R., 118). The conductor of the wrecked train (R., 134, 137) found a rail disconnected, the angle bars off, with the bolts out, *and the nuts screwed off first*, and the spikes pulled from the outside of this rail, which was shoved forward 8 or 10 feet, with nuts, bolts and angle bars lying on the ground; only one rail had been tampered with, but that was enough to wreck the train. The flagman found about the same condition as to the bolts

and angle bars (R., 143); the spike holes in the cross-ties were clear under the part of the removed rail witness could see (R., 144). The vice-president and general manager of the Charleston & Western Carolina Railway Company at from 6:00 o'clock a. m. to 8:00 o'clock a. m. found that the rail had been removed from the track with the angle bars loose on either side of it and the spikes on one side of the rail removed and the rail pushed forward six or eight feet. He was struck with the fact that no effort appeared to have been made by the person to remove the rail to hide the fact that it was out of place (R., 147, 148); the angle bars and bolts were in good condition (R., 148); all of the bolts and spikes were taken out of the rail (R., 151), and a sectionman would not take them off in that way (R., 150); the end of the rail toward Augusta was disconnected, but this witness did not see where it had been pushed in and spiked down (R., 154), as some of the other witnesses had testified; the condition of the loosened rail caused the wreck (R., 155).

A passenger on the wrecked train, *who was also an inspector and special investigator for the Interstate Commerce Commission, with years of railroad experience,* both on that Commission and on a state railroad commission, and as a railroad trainman (R., 168, 170), examined the track immediately after the wreck and testified that one rail was out of place and the angle bars had been removed from each end of the rail and that an examination of the angle bars, bolts and nuts, which were lying close by, *indicated that they had been removed by someone on purpose;* the rail

vas six or eight inches out of alignment and bent; that he condition of the bolts showed that they had not been stripped in any way, and the track was in nearly perfect condition in its line and gauge (R., 169); that here was no indication that the condition of the track aused the rail to spread; the spikes pulled from the ies had been pulled directly upward, whereas there would have naturally been a slanting pull or a splinted tie, if they had been crushed out (R., 170, 172); *hat it would have been impossible for a whole train q have gotten over the track with the rail removed s it was* (R., 178).

Six trains, both freight and passenger, passed over he place of the wreck *in both directions* between the fternoon of May 19 and the time of the wreck at :10 a. m. May 20; these being: train to Augusta assed place of wreck about 5:30 p. m.; local freight rain passed there about 7:15 p. m. going to Augusta; reight train *from Augusta* passed point of wreck about :30 p. m.; passenger train to Augusta passed point f wreck about 6:20 or 6:15 p. m.; Charleston & Western Carolina Railway through freight to Augusta assed place of wreck about 1:25 a. m.; Atlantic Coast ine passenger train going West passed point of reck about 1:35 a. m. on May 20; and freight train *om Augusta* passed place of wreck about 12:30 a. m. ., 66, 67, 68, 70, 73, 74); the wrecked train left ugusta at 2:50 a. m. and reached the place of the reck about 3:10 a. m. (R., 75). The engineers of ese trains testified that they noticed nothing unual in passing over the point at which the wreck curred and observed no defect in the track. If

they had noticed any unusual condition, it would have been the duty of the engineer to report same (R., 96, 100, 102, 104, 105, 106, 107, 108). The roadmaster had carefully inspected this track as late as 5:30 p. m. on May 19 (R., 50); he rode over this track two or three times a week and these inspections were the customary method of inspecting track (R., 53, 54, 88, 89, 92). The inspection given to this track compares favorably with the inspection of railroad tracks generally, according to the testimony of the Interstate Commerce Commission's inspector (R., 71). The track at the place of the wreck had been newly timbered, bolted up and surfaced about two months, or less, before the wreck, and was then practically built over, new cross-ties put in, and the track had had time to settle (R., 32, 38, 50, 57).

On the afternoon of the wreck witness Dobson, who testified for both respondent and petitioner (R., 19, 20, 33, 65), in following two tracks of men in a path leading up the bluff, about 100 feet from the place of the wreck, found a wrench and a pull or crow bar which had on them the markings of Southern Railway ownership; the wrench would unscrew the nuts on the removed rail (R., 20); it was intended for use in removing bolts and angle bars from 80 pound rail, which was the weight of the rail in question (R., 163). One man could easily have loosened the angle plates on the removed rail and removed the spikes and moved the rail out of position, and could do so easily within an hour and a half (R., 86). On the morning of the wreck, May 20, the section foreman of the Southern Railway, whose section-house was about

four miles from the place of wreck, found that his section tool house had been entered some time the night before and a crow bar and a wrench taken therefrom. The Southern Railway's wrench, which was stolen, was of the same size as that used on the Charleston & Western Carolina Railway for handling 80 pound rail *and the Southern Railway section foreman identified the tools found near the wreck as being those stolen from his tool house* (R., 157 to 163).

Judgment was rendered for respondent in the sum of Twenty Thousand ($20,000) Dollars (R., 4), which judgment was affirmed by the Supreme Court of South Carolina on July 31, 1931, as shown by its opinion and judgment in the record, Cothran, J., dissenting (R., 201).

II.

Your petitioner earnestly contends that writ of *certiorari* should be granted by this court to review and reverse the judgment of the State Supreme Court herein because:

There is no substantial evidence whatever in the record to show negligence by the section force in maintaining the track at the place of wreck, as alleged, but the undisputed evidence tends strongly to show that the wreck was caused by the criminal acts of third persons.

Norfolk & W. Ry. Co. vs. *Gilespie,* 224 Fed. 316 (C. C. A., 4th Cir.);

Savitz vs. *Lehigh & N. E. R. Co.,* 199 Pa. 218; 48 Atl. 987;

Atlantic Coast Line R. Co. vs. *Davis, Admr.,* 279 U. S. 34.

WHEREFORE, because said decision and judgment of the State Supreme Court decided the foregoing Federal question in a way not in accord with the applicable decisions of this Court, your petitioner prays that a writ of *certiorari* be issued to the Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that upon such review the said judgment of the Supreme Court of the State of South Carolina, be ordered reversed.

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOMAS W. DAVIS,
DOUGLAS McKAY,
V. E. PHELPS,

Attorneys for Petitioner,
Atlantic Coast Line Railroad Company.

Wilmington, N. C., October 8th, 1931.

INDEX TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Subject Index.

	Page
Brief in support of petition for writ of certiorari	13
Official report	13
Statement of grounds of jurisdiction	13
Statement of case	14
Argument and proposition	15
I. There is no substantial evidence to show negligence by the section forces in maintaining the track, as alleged in the complaint, but the undisputed evidence tends strongly to show the wreck was caused by criminal acts of third persons	15
Conclusion	37

Table of Cases Cited.

Atlantic Coast Line R. Co. vs. Davis, Admr., 279 U. S., 34	14, 16
Chesapeake & Ohio Ry. Co. vs. Martin, decided April 13, 1931	34
Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 472, 477	24
Cincinnati, N. O. & T. P. R. Co. vs. Rankin, 241 U. S., 319, 327	19
Gunning vs. Cooley, 281 U. S., 90-94	14, 16, 22
Manning vs. John Hancock Mutual Life Ins. Co., 100 U. S., 693	24
Norfolk & Western Ry. Co. vs. Gillespie, 224 Fed., 316 (C. C. A., 4th Cir.)	14, 34
Patton vs. Texas & Pacific R. R. Co., 179 U. S., 658	37
Savits vs. Lehigh & N. E. R. Co., 199 Pa., 218	14, 35
United States vs. Ross, 92 U. S., 281	24

Statutes Cited.

Federal Employers' Liability Act of 1908, as amended	13
Judicial Code, Section 237, as amended by Act of Congress, September 6, 1916, Chap. 448, Sec. 2, and Act of Congress, February 13, 1925, Chap. 229, Sec. 1	14

Other Authorities Cited.

Words and Phrases, Volume 8, page 7317	21

CHECK TO INDEX BY REPORT OR DIGEST FOR WANT OF
AUTHORITY

Short Index

Brief in support of motion for writ of certiorari 18
Opinion below 19
Statement of grounds of jurisdiction 19
Statement of case 19
Specification of errors 19
Argument and propositions 19
I. There is no substantial evidence to show negligence
on the part of the defendant, but the undisputed evi-
dence in the case is that the defendant was
guilty of no negligence, as above the verdict was directed
by original acts of third persons 19
Conclusion 37

Table of Cases Cited

Atlantic Coast Line R. Co. ex. Davis, Admr. 230 U. S. 81 ... 14,16
Chesapeake & Ohio Ry. Co. ex. Werth, decided April 13, 1921 ... 31
Gaines, 2d, & Al. v. Pennsylvania Co., 257 U. S. 172 ... 24
Gaudet v. Gaudet, 94 Ky. 1, 21 S. W. 3, 14 L. R. A. 593 ... 20
Gaughey ex. Cooley, 281 U. S. 1 ... 15,16,22
Hughes ex. Ann Arbor Railroad Co., 199 U. S. 62 ... 24
Kenyon & Western Ry. Co. v. Gilmore, 254 Fed. 916 (C. C. A. ... 14,34
8th Cir.) ... 37
Patton ex. Texas & Pacific R. R. Co., 179 U. S. 658 ... 14,23
Spitis ex. Chicago & N. W. R. Co., 180 Ia. 218 ... 24
Unity Store ex. Ross, 92 U. S. 281 ...

Statute Cited

Federal Employers' Liability Act of 1908, as amended ... 18
Judicial Code, Section 237, as amended by Act of Congress, Sept. 6, 1916, Chap. 448, Sec. 2, and Act of Congress, Feb. 13, 1925, Chap. 229, Sec. 1 ... 14

Other Authorities Cited

Words and Phrases, Volume 8, page 7187 ... 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 453

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

HANNAH R. TEMPLE, ADMINISTRATRIX OF THE ESTATE OF JOSEPH R. TEMPLE, DECEASED, RESPONDENT.

BRIEF FOR PETITIONER.

Official Report.

The decision of the Supreme Court of South Carolina has not yet been officially reported. It is found on page 201 of the record.

Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is July 31, 1931 (R., 201).

This action was brought, tried and decided under the Federal Employers' Liability Act of 1908, as

amended (R., 4, 7, 9, and opinion of the State Suprem Court, page 201 of record). Judgment was rendere for respondent herein in the sum of twenty thousan ($20,000) dollars and petitioner appealed to the Stat Supreme Court. The judgment was affirmed by th South Carolina Supreme Court (R., 201), Cothran, J dissenting (R., 205).

The jurisdiction of this Court is invoked under th Federal Employers' Liability Act of 1908, as amended and under Judicial Code, Section 237, as amended b Act of Congress September 6, 1916, Chapter 448, Sec tion 2, and Act of Congress February 13, 1925, Chap ter 229, Section 1.

The cases believed to sustain the jurisdiction of thi Court are:

Atlantic Coast Line R. Co. vs. *Davis, Admr* 279 U. S. 34.

Gunning vs. *Cooley,* 281 U. S. 90.

Norfolk & W. Ry. Co. vs. *Gillespie,* 224 Fed 316 (C. C. A., 4th Cir.).

Savitz vs. *Lehigh & N. E. R. Co.,* 199 Pa. 218.

Statement of Case.

All of the relevant facts are fully set out in th petition, and will be stated in the body of this brie only in so far as may be necessary to a discussion o the question involved.

ARGUMENT.

There is no substantial evidence to show negligence by the section force in maintaining the track at the place of wreck as alleged in the complaint, but the undisputed evidence tends strongly to show that the wreck was caused by the criminal acts of third persons.

This question is raised by petitioner's second and third exceptions (R., 200).

The sole question involved in this application for *certiorari* is the sufficiency of the evidence to sustain a finding of negligence as alleged in the complaint. The trial judge charged the law of the case under the Federal Employers' Liability Act, and properly charged (R., 188) that in order to convict the defendant railroad company of negligence, plaintiff must prove the existence of the defect complained of and that it was a defect of such a character as to cause its existence to be a negligent failure on the part of the defendant, proximately causing the injury. The State Supreme Court (R., 204) held that in accordance with the requirements of the Federal Act, the plaintiff assumed the burden of establishing negligence by defendant as to the acts alleged, and further held that the evidence in the case made the question of negligence one for the jury and sustained the judgment for respondent.

Before considering the sufficiency of the evidence to sustain the finding of negligence as alleged, it will be well to briefly refer to several decisions of this Court which petitioner believes are applicable to the

facts and judgment herein. In the case of *Atlantic Coast Line R. Co.* vs. *Davis, Admr.*, 279 U. S. 34, the Court, on page 35, reiterated this well-established proposition:

> "It is unquestioned that the case is controlled by the Federal Employers' Liability Act, under which it was prosecuted. Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the railroad company was the cause of the death, the judgment must be reversed. *Gulf, M. & N. R. Co.* vs. *Wells*, 275 U. S. 445, 457; 72 L. ed. 370, 371, 48 Sup. Ct. Rep. 151, and cases cited."

In referring to the amount of evidence necessary to carry a case to the jury in the Federal Courts, this Court said, in the recent case of *Gunning* vs. *Cooley*, 281 U. S. 90-94:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Schuylkill & D. Improv. & R. Co.* vs. *Munson*, 14 Wall. 442, 448, 20 L. ed. 867, 872; *Pleasants* vs. *Fant*, 22 Wall. 116, 122, 22 L. ed. 780, 783."

The Court further said:

"Where the evidence upon any issue is all on one side *or so overwhelmingly on one side as to leave no room to doubt what the fact is*, the court should give a peremptory instruction to the jury." (Italics ours.)

"*'When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.'*"

Again, on page 95, the Court said:

"The burden was on plaintiff to establish the negligence and injury alleged; and, if the evidence failed adequately to support either element, defendant's motion should have been granted."

The State Supreme Court in its opinion (R., 205) held that the evidence led to the conclusion that the rail in question was left unbolted and unspiked by the section hands (as alleged in the complaint) and that it was not occasioned by some outside person as claimed by petitioner. Petitioner contends that a mere reading of the record shows that there is no evidence whatever to prove negligence in the respect alleged. On the other hand, both respondent's undisputed evidence, as well as the undisputed evidence of petitioner, tends to show that the wreck was caused by the acts of third persons for which petitioner would not be responsible. No one saw the removal or misplacement of the rail which caused the wreck,

and the evidence is therefore wholly circumstantial, making it necessary to briefly refer to the material evidence given on behalf of both parties. Only two witnesses testified for respondent, and the testimony of one of them (witness Dobson) tends to support the position of petitioner rather than that of respondent, as to the cause of the wreck (R., 10), while the testimony of respondent's other witness, Randall (R., 20), does not legally or logically tend to show who removed the rail or what caused the wreck. Respondent's witness Dobson (R., 13 to 23), was a merchant and farmer who lived at Beech Island, about a mile and a half from the wreck, and ran a gravel bed or pit located just west of the place of the wreck. He arrived at the wreck at 6:30 a. m. He testified that he found the rail torn up and the bolts and spikes were lying loose on the cross-ties and that the bolts and angle bars (R., 17) had been *removed* by somebody, and that the end of the rail removed was pulled in and "spiked in from the outside, and the track made too narrow." Only one other witness in the case appears to have testified that the rail was *spiked down out of line*, this being petitioner's witness Davies (R., 59). None of the other witnesses said that the rail was spiked down out of line and one of them said that it was not (R., 154). If the removed rail was so spiked down, as testified by respondent's witness, Dobson, this would seem clearly to indicate that the rail was removed by third persons for criminal purposes. It certainly cannot be assumed, without any substantial supporting evidence, that the section forces committed such a vicious and criminal act. In the absence of

contrary proof, the law presumes righteousness, rather than unrighteousness.

> "'The law presumes that every man, in his private and official character, does his duty; until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption.'"
>
> *Cincinnati, N. O. & T. P. R. Co.* vs. *Rankin,* 241 U. S. 319-327.

Respondent's witness Dobson further testified that it was not merely a matter of fixing the track and leaving the spikes out, but that the spikes were "pulled" out (R., 20). A significant part of the testimony of this witness is that on the afternoon of the wreck, he was walking around at the place of the wreck and found two tracks of men on a path leading from the place where the rail was removed to a bluff some fifty or sixty feet away, and there found a wrench and pull bar, which were railroad tools and which bore on them marks of the Southern Railway and were used, respectively, for removing the nuts from angle bars and for pulling cross-tie spikes (R., 19 to 23). These same tools, which witness Dobson found so near the wreck, were stolen from a tool-house of the Southern Railway on the night of the wreck (R., 157-159). This tool-house is four miles from the point of the wreck (R., 160). He testified that the Southern wrench was slightly larger than the bolts and nuts on the removed rail and had some play, but that they tried it, and it would work and hold

enough to get the nuts off (R., 20). Dobson further testified for respondent that he was at his gravel pit every day in the week, except Sunday, and that the C. & W. C. section forces did not work at the place of the wreck that week, but worked at or near there the week before the wreck (R., 16, 18). Petitioner submits that there is nothing in the testimony of this witness to show that railroad section forces caused the wreck, but on the contrary, his testimony strongly shows that the wreck was caused by the criminal acts of third persons, who stole track tools from a nearby tool-house of the Southern Railway and removed and spiked in the rail out of line, thus causing the wreck.

The only other witness who testified for respondent was witness Randall. This witness was not at the wreck and his testimony was given about five years after the wreck occurred. He testified that as he crossed the railroad in a wagon at Beech Island station (which is 1.3 miles from the place of the wreck, R., 129) about four or five o'clock on the afternoon before the wreck occurred, he saw some section men working, like fixing a rail, between Beech Island station and the sandpit "way up the road", but this witness did not pretend to say just where the section men were working (R., 24, 26). Later on this witness testified, in answer to a leading question by respondent's counsel, that the men were working "in the vicinity" of the sandpit (R., 27). The sandpit is a few feet west of the place of wreck in the direction toward Augusta (R., 131.) The State Supreme Court

in its opinion held (R., 205) that it might be reasonably inferred from the testimony of this witness that the section men were working at or near the place of the wreck before it occurred a few hours later. Petitioner submits that the evidence of this witness will not support a finding that the section force was working at the very place of the wreck the afternoon before it occurred, and even if it would support such a finding, it would not support a finding that the section force removed the rail in question and spiked it in out of line. Giving Randall's testimony full effect, he only says that the section force was working "in the vicinity" of the sandpit. The quoted words taken from his testimony are merely relative and do not express any definite idea of distance. Words & Phrases, Volumne 8, page 7317. Randall was at Beech Island crossing when he thought he saw the section force, which is 1.3 miles from the place of the wreck; he says that he saw them between Beech Island station and the sandpit "way up the road", and under these circumstances his later expression that they were *in the vicinity* of the sandpit might mean that they were within one hundred feet of it, or within several hundred yards of it. It must be borne in mind that, according to respondent's contention, this witness was testifying as to men he claimed to have seen on the railroad track over a mile away, and it is perfectly apparent, giving full effect to his testimony, that in looking such a distance he certainly could not fix the exact point at which the section force was

working and probably could not do so within several hundred yards or more. Furthermore, we call the Court's attention to the fact that four witnesses, including witness Dobson, testified without contradiction that a person crossing the track at Beech Island station, from where Randall said he saw the section force, could not see the place of the wreck on account of a five-degree curve intervening and could not see nearer to the point of the wreck than three-tenths of a mile (R., 126, 129, 34, 58 and 165). This curve is shown on the map, petitioner's exhibit 4 (with record). No specific attempt was made to contradict the testimony of these witnesses, and we submit that under the rule hereinbefore quoted from the case of *Gunning* vs. *Cooley, supra*, the overwhelming weight of evidence and undoubted fact is that the witness Randall did not and could not see a section force at the place of the wreck from Beech Island crossing. Respondent's other witness, Dobson, who was at the sandpit every day, testified that the section force was not working at or near the place of the wreck that week, but was working there the week before the wreck and did some work for witness at the sandpit (R., 18). If the testimony of witness Randall were susceptible of the construction sought to be given it by the respondent and the State Supreme Court, namely: that the section force was working at the exact place of the wreck and fixing the removed rail the afternoon before the wreck, it is contradicted by the testimony of witness Dobson, and the rule of the Gunning case, *supra*, to

the effect that when plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither, would apply. This rule is also applicable to the whole case attempted to be made out by respondent, because undoubtedly the tendency of witness Dobson's testimony, as a whole, is to sustain the hypothesis that the wreck was caused by the criminal acts of third persons, and his testimony is certainly consistent with the hypothesis that petitioner was not negligent.

Further, in order to prove circumstantially by witness Randall's testimony that the section force removed the rail which caused the wreck, it is necessary to presume, or infer, one or more intermediate circumstances without any proof of such circumstances. Giving the fullest effect to Randall's testimony, it is that the section force was working on the afternoon before the wreck "in the vicinity" of the sandpit, which is very close to the point of wreck. To constitute this testimony circumstantial evidence that the section force removed the rail in question, it would be necessary to infer without proof: first, that they were working at the exact place and on the very rail which was removed, and second, that they actually removed the bolts and spikes from this rail and left it out of place so as to cause the wreck. There is no circumstantial evidence whatever in the record to prove these two further facts, and it is well settled under the decisions of this court that *whenever circumstan-*

tial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed.

United States vs. *Ross*, 92 U. S. 281.

Manning vs. *John Hancock Mutual Life Insurance Co.*, 100 U. S. 693.

Chicago, M. & St. P. R. Co. vs. *Coogan*, 271 U. S. 472, 477.

Petitioner submits, therefore, that witness Randall's testimony, taken by itself, or with respondent's other testimony is wholly insufficient to sustain a finding that the section force removed the rail in question. The testimony of Dobson, respondent's only other witness, affirmatively tends to point to a contrary conclusion.

The petitioner introduced a number of witnesses, both employees and non-employees, who testified to the condition of the track immediately after the wreck and also as to the condition of the track before the wreck. All of this testimony, as well as that of respondent's witness Dobson, clearly points to the same conclusion, with only such variations in the testimony of the several witnesses as to minor details which is usually found when a number of persons truthfully testify to the same facts. As appears from the detailed summary of the testimony in the petition, petitioner offered the testimony of the section foreman in charge of that division of track, as well as the testimony of a number of trainmen and maintenance of way officers of both the Charleston & Western Carolina Railway Company and of petitioner. All of these

witnesses (as well as respondent's witness Dobson) testified without contradiction that the spikes of the removed rail were *pulled* out, leaving clear holes, and were not mashed out. The significance of this testimony, as explained by witness Johnson (R., 172, 173), who was an experienced special investigator for the Interstate Commerce Commission and a passenger on the train, is that had the spikes not been pulled out and had been crushed or mashed out upon the flooring of the rail by the weight of the wrecked train, "it would naturally have made a slanting pull or splintered the tie, but they were pulled out straight." This circumstance, we submit, clearly indicates that the rail was removed intentionally and deliberately before the wreck occurred. The bolts, nuts and angle bars of the rail which had been removed and misplaced were lying on the ground between the ties or near the ends of the ties where they were removed. One witness, the engineer of maintenance of way of the Charleston & Western Carolina Railway, testified (R., 91) that the bolts and nuts and locks were in a pile at the end of the rail. The conductor of the wrecked train (R., 134 to 137) testified that the nuts had been *screwed off first* and the spikes pulled from the outside of the rail which was shoved forward about eight or ten feet, and the nuts, bolts and angle bars were lying on the ground. The flagman testified to about the same conditions as to the bolts, angle bars and rail (R., 143). Two witnesses testified, without contradiction, that a section foreman in removing a rail and in taking off

the bolts and angle bars would not take them off in that way, but would ordinarily break the bolts with a hammer and carry away the scrap (R., 150, 114). One of the petitioner's witnesses testified, in agreement with the testimony of respondent's witness Dobson, that the bolts and nuts had been removed and the rail had been "set in and was spiked down on the outside" (R., 56, 59, 61). The special investigator of the Interstate Commerce Commission, above mentioned, as well as some of the railroad employees, expressly testified that the condition of the track and angle bars and bolts *indicated that they had been removed by someone on purpose* (R., 169). We submit, therefore, that this testimony, which is wholly uncontradicted and is supported by respondent's own testimony, shows clearly that the removal of the rail was intentional and deliberate, thereby negativing any possibility that the wreck could have resulted from the bad condition of the track or from any neglect of a section force in failing to adequately spike the track. In fact, the special investigator for the Interstate Commerce Commission testified that there was no indication that the condition of the track caused the rail to spread (R., 170). This witness investigated this particular wreck and afterwards made an official report to the Interstate Commerce Commission concerning it (R., 174), so that his testimony is entitled to the highest credence, both on account of his large experience in such matters, as well as his official position and duties with the Interstate Commerce Commission.

His testimony agrees in all material matters with that given by petitioner's other witnesses.

If the rail was deliberately removed by someone, thus necessarily causing the wreck, the only remaining question is whether there is any substantial evidence that this was done by the section force of the Charleston & Western Carolina Railway. We have shown that the testimony of respondent's witness Randall will not sustain such a finding and that of respondent's witness Dobson affirmatively tends to show, in connection with parts of petitioner's undisputed testimony, that the rail was removed by third persons for criminal purposes. Petitioner's undisputed testimony supports this theory. It will be recalled that respondent's own witness Dobson testified that on the afternoon of the wreck he followed the tracks of men in a path leading from the wreck to a bluff some fifty to one hundred feet away and there found a wrench and crow bar which had on them the markings of Southern Railway ownership, and that this wrench would unscrew the nuts on the removed rail. This testimony is given the highest significance by the testimony of the section foreman of the Southern Railway, introduced by petitioner, who had charge of a section of that railway and whose section-house was about four miles from the place of wreck. He testified that on the morning of the wreck, May 20, he found that his section tool house had been entered sometime during the night before and a crow bar and track wrench taken therefrom and he *identified the*

served no defect in the track (R., 96, 100, 102, 104 to 108). The track itself had been carefully inspected by the roadmaster of that division as late as 5:30 p. m. on May 19 (R., 50), and no defects found. The inescapable conclusion from the foregoing undisputed facts is that the rail was not removed by the section force of the Charleston & Western Carolina Railway on the afternoon before the wreck, but that it was removed by some unknown third person or persons with deliberate and criminal intention on the night of the wreck and within approximately an hour and a half to two hours and a half before the wreck; otherwise the through freight train which passed the place of wreck about 1:25 a. m. and the passenger train from Augusta which passed about 12:30 a. m., could not have passed over the track at this point and would have been derailed, as was the wrecked train. The undisputed evidence is that one person could easily have taken off the angle bars and bolts and removed the rail in question *in less than one hour and a half* (R., 86). It is plain, therefore, that the person or persons whom the evidence tends to show stole the necessary tools from the Southern Railway tool-house, would have had ample time to remove the rail after the last train before the wreck passed that point at 1:25 a. m.

In this connection, we desire to comment briefly on an argument made in the opinion of the State Supreme Court in its attempt to explain the fact that trains that passed over the place of the wreck going in the direction of Augusta during that night passed

over safely without derailment. It refers to testimony of respondent's witness Dobson (R., 14, 15), to the effect that the flanges or angle plates were on the Augusta end of the removed rail and that there was a dent about the middle of that rail. It then quotes a question asked witness Dobson as to whether a train *going toward Augusta* would hit the rail that way and quotes his answer to that and the following question:

> "No sir, it would push it back in, it looks like."
>
> Q. "But one coming from Augusta would hit it?"
>
> A. "Yes sir."

The State Supreme Court then draws this conclusion:

> "If this be true, a train going over the rail in question in the direction of Augusta would not be wrecked, and this accounts for the facts that the trains that passed over the place going in the direction of Augusta during the same night, passed over safely."

The testimony of witness Dobson, quoted by the State Supreme Court, that a train going toward Augusta would not hit the rail so as to dent it in the middle, but one going from Augusta would so hit it, does not at all justify the conclusion of that Court that a train going in the direction of Augusta *would not be wrecked.* All that this testimony does tend to prove, if anything material, is that the rail was not out of place when the last train going to Augusta had

passed that point, which was 1:25 a. m., or an hour and forty minutes at least before the wreck occurred. This vitiates the further conclusion of the State Supreme Court above mentioned. Furthermore, this argument of the State Supreme Court wholly ignores the undisputed fact that *two* trains did pass the place of the wreck *coming from Augusta*, as did the wrecked train, these two trains passing the place of the wreck at about 6:30 p. m. May 19 and 12:30 a. m. May 20, respectively (R., 67, 74). The last train passed only about two hours and forty minutes before the wreck. The train coming from Augusta which passed the place of the wreck about 6:30 p. m., passed another train, either No. 45 or No. 15, at Beech Island, and the passing track is about a mile from the wreck (see map, Ex. 4, with record) (R., 68, 70), and it is not entirely clear from the record whether this train used the pass track or the main line, but the fact remains that the train coming from Augusta which passed the place of wreck at 12:30 a. m., two hours and forty minutes before the wreck, did not pass another train and hence went over the track where the rail was afterwards removed (R., 71). So that it is clear that at least one train, going in the same direction as the wrecked train, went over this track within less than three hours before the wreck, and the other four or five trains went over the place of wreck between the time the section force quit work and the time of the wreck. All of this demonstrates that the rail must have been tampered with after the last of these trains went over the track.

The only other attempted argument or reason given

for its decision by the majority of the State Supreme Court is the following:

> "It is hard to conceive of a person bent on mischief taking time enough to arrange the bolts and spikes in the order in which they were found and to have done the other acts in the manner described by witnesses. On the other hand, it may be reasonably inferred from all of the facts and circumstances that the section hands left the work at that place unfinished the evening before the wreck occurred."

This comment does not find any support in the evidence and seems to us to be without any basis in the light of common experience. All that the evidence showed as to the condition of the bolts and spikes and angle bars, is that they were thrown out and piled between or near the ends of the ties where they were taken off, and it is not unreasonable to believe that persons removing the rail to wreck the train would pile the bolts and spikes on the track where they took them off. On the other hand, the affirmative testimony is that section forces in removing these things would not do it in this manner (R., 114, 150). The State Supreme Court, except as heretofore mentioned, does not designate a single fact which leads to its conclusion that the section hands removed the rail and left it in that condition, and we submit there are no facts justifying this conclusion.

Petitioner has summarized and discussed all of the material facts in the case. It will be observed that most of these facts are testified to by persons who are

not employees of the petitioner, namely, respondent's witness Dobson, the officers and employees of the Southern Railway Company and Charleston & Western Carolina Railway Company, a planter living near the wreck, who examined it shortly thereafter, and a special investigator of the Interstate Commerce Commission. The only material facts testified to by petitioner's own employees, which are not also shown by other testimony, are those given by its dispatchers, who testified to the schedule of the trains passing over the track and the testimony of petitioner's engineers who operated those trains. Their testimony is uncontradicted and there is certainly nothing inherently improbable in any of it. The testimony of these employees is therefore entitled to as much credibility as that of other witnesses. *Chesapeake & Ohio Ry. Co.* vs. *Martin*, decided by this Court April 13, 1931.

It is difficult to find authorities very closely in point on the facts in such cases as this, as the physical facts of a wreck necessarily differ in every case. However, we wish to call the Court's attention to the case of *Norfolk & W. Ry. Co.* vs. *Gillespie*, 224 Fed. 316 (C. C. A., 4th Cir.). The action here was for the death of an engineer which occurred by reason of a derailment and one ground of negligence relied on was in allowing a low joint or uneven place in the track. We quote from the opinion of the court on page 323:

> "The witness Combs testified that the engine rocked, or went up and down, and that a low joint would cause such motion. The engineer of the rear engine on the same train testified that

> the first sign he saw of danger was the tender leaning off to one side. The apparent rocking of the engine and leaning of the tender would be insufficient evidence from which to infer that there was a low joint in the track, for this appearance might have been produced by other causes, such as very high speed on a curve or defects in the wheels or trucks. Inspection after the accident did not disclose a low joint. *A conclusion under these circumstances that there was a low joint, and that it was the cause of the derailment, would be based on conjecture.*" (Italics ours.)

The court held that a verdict based on this evidence would be based on conjecture alone, and yet the facts mentioned by the court undoubtedly constituted more of a semblance to, or scintilla of, evidence than any evidence to be found in the present record on the question of negligence relied on.

We may also mention the case of *Savitz* vs. *Lehigh & N. E. R. Co.*, 199 Pennsylvania 218, which involved the derailment of a train by running through a switch into a sidetrack, and the negligence alleged was that defendant allowed a switch which connected the main line with a siding to be out of repair and unlocked, by reason of which the engine was deflected to the sidetrack. In referring to the insufficiency of the evidence to establish this negligence, the court said:

> "The witness was an engineer, who had been in the employ of the Central Railroad a number of years on the branch road on which the accident happened. He testified that it was his custom to run slowly as he approached the

switch, that he might see that it was properly set before he reached it; that at one time a spike had been used to hold the rail of the switch close to the main track, and that when the spike was removed an opening could be seen between the rails. From this he inferred that the spring was weak, or that the end of the rail was bent. He had never inspected the switch, nor made any examination, except by looking at it as he passed on his engine. He had never stopped at the point, nor been delayed by the condition of the switch. Although passing daily, he had not observed the condition of the switch within two weeks or more of the accident, and he did not state what its condition was when he last observed it. His testimony as to the existence of a defect in the switch, as to its character, and as to the time when he had observed it, was exceedingly vague, and it appeared that his reason for running slowly as he approached the switch was that he feared that, as at times it was unlocked, boys might interfere with it. Giving to this testimony the fullest effect in the plaintiff's favor that can reasonably be claimed for it, it showed only that at a period two weeks or more before the accident the rails were not close together, the extent of the separation being defined by the expression of the witness 'You could see in there. It didn't lay tight.' If the case had been submitted on this testimony, the jury would have been left to find that, because the rails did not fit closely two weeks before, there was a defect sufficiently serious to cause the accident, and then to infer (1) that the defect continued although no one had seen it in the meantime, *and its existence was not disclosed in the constant*

> *use of the road;* (2) that the defect did cause an accident which with equal probability could be attributed to any one of several other causes for none of which was the defendant liable. *This would have been mere conjecture and wholly insufficient to sustain a verdict in favor of one on whom the burden of affirmative proof of negligence rested.* (Italics ours.)

The evidence set out in this Pennsylvania case was more definite and to the point at issue than any evidence in the instant case, but the reasoning and conclusion of that court is applicable to our case; in other words, in neither case can a jury properly make a finding of negligence without basing inference upon inference and without any supporting testimony.

The circumstantial evidence in this case, when fairly considered, does not rise to the dignity of showing that the acts of the section forces *might* have been one of the *possible* causes of the wreck, but if the testimony did go to this extent, it is well settled by the decisions of this Court that it is not sufficient for the employee to show that the employer *may* have been guilty of negligence, but "the evidence must point to the fact that it was." *Patton* vs. *Texas & Pacific R. R. Co.*, 179 U. S. 658.

Petitioner would call the attention of the Court to the full and accurate discussion of the law and facts of the case in the dissenting opinion of Cothran, J. (R. 204), which we think states the true rule of decision in the case.

Petitioner, therefore, submits that there is no substantial evidence whatever in the record to sustain

a finding of the existence of the negligent acts alleged and relied on by respondent. On the other hand, even if the burden were on petitioner to exculpate itself from negligence, which it is not, the evidence as a whole would fairly and amply sustain a finding that the wreck was not caused by any acts of the section forces, but was caused by the deliberate and criminal acts of unknown third persons. This application should therefore be granted and the judgment herein be reversed by this Court, to the end that petitioner may be relieved of the very substantial burden thereby imposed upon it.

Respectfully submitted,

THOMAS W. DAVIS,
Wilmington, N. C.
DOUGLAS McKAY,
Columbia, S. C.
V. E. PHELPS,
Wilmington, N. C.
Attorneys for Petitioner,
Atlantic Coast Line Railroad Company.

Wilmington, N. C., October 8, 1931.

tools found near the wreck by respondent's witness Dobson as being the tools stolen from his tool-house (R., 157, 158, 159). This is a strong circumstance that some person or persons (inferentially two men, since the tracks of two men were found near the track) with criminal intent broke into the tool-house of the Southern Railway on the night before the wreck, removed these tools and went to the place of the wreck within an hour or more before the wrecked train reached this point and removed the rail in question, causing the wreck and the unfortunate death of the intestate. To argue, as respondent and the State Supreme Court attempt to do, that the evidence supports a finding that the rail was tampered with and removed by the section force, rather than third persons, is to shut the eyes to much undisputed and credible evidence in the record and to imagine facts where none exist.

This contention of respondent and the conclusion of the State Supreme Court is further rendered wholly untenable by other undisputed evidence in the record. This evidence is that *six* trains, both freight and passenger, passed over the track at the place of the wreck going *in both directions* between 5:30 p. m. May 19 and 3:10 a. m. May 20, at which latter time the wreck is supposed to have occurred. One of these trains passed the place of wreck about 5:30 or 5:35 p. m. going to Augusta; a local freight train going to Augusta passed the point of the wreck about 7:15 p. m.; another freight train *from Augusta* passed there about 6:30 p. m.; a passenger train going to Augusta passed

over the place of wreck about 6:20 p. m. or 6:15 p. m.; the Charleston & Western Carolina through freight going to Augusta passed the place of wreck about 1:25 a. m. (about one hour and forty-five minutes before the wreck); Atlantic Coast Line passenger train going toward Augusta passed the point of wreck about 1:35 a. m. on May 20, and a freight train *from Augusta* passed the place of wreck about 12:30 a. m. May 20, or about two hours and forty minutes before the time of the wreck (R., 66, 67, 68, 70, 73, 74). The wrecked train itself left Augusta at 2:50 a. m. and reached the point of the wreck about 3:10 a. m.

It is perfectly apparent, even to a layman or one having no specific or expert knowledge of such matters, that these trains could not have passed over the track at the place of the wreck without derailment with the track in the condition it is shown by the testimony to have been. This conclusion is confirmed by the positive and undisputed testimony in the case. The special investigator for the Interstate Commerce Commerce, witness Johnson, testified that it would have been *impossible* for a whole train to have gotten over the track with the rail removed as it was, and that the same was, of course, true of four or five trains (R., 178). Petitioner's general roadmaster testified to the same effect (R., 78). It was the condition of the loosened rail which caused the wreck (R., 152). Furthermore, the engineers of these trains testified that in passing over the track at the place of the wreck, they noticed nothing unusual at that point and ob-